TAN GOON GAN

v.

ANG TEIK BENG

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 101 OF 1981]
16 JANUARY 1984

TORT: *Negligence - Liability - Motor accident - Personal injuries - Whether defendant liable - Contributory negligence - Whether plaintiff liable - Damages - General damages - Pain and suffering - Loss of amenities - Post-trial loss of earnings - Special damages - Pre-trial loss of earnings.*

The plaintiff, an unmarried woman aged 23, sustained serious personal injuries as a result of being involved in a collision with a motor-cycle while riding a pedal bicycle on her way home after work at about 11.45 p.m. The plaintiff was employed as a waitress at a cafe. The collision occurred along a straight stretch of road known as Jalan Bagan Luar, Butterworth.

Held:

A. Liability

[1] Both the plaintiff and defendant were liable for the accident. At the time of the accident the plaintiff was attempting to turn right thereby cutting across the defendant's right of way. The defendant, on his part, if he had been keeping a proper look out and driving with his lights on high beam, might have noticed the plaintiff sooner and thus have avoided the collision, the stretch of road in question being straight, fairly wide and reasonably well lit.

[2] The plaintiff was two-thirds and the defendant one-third to blame for the collision. The greater blame must be allocated to the plaintiff, keeping in mind the principle that when it is necessary for a Court to ascribe liability to more than one person, regard must be had not only to the causative potency of the acts but to their relative blameworthiness.

B. Damages

[1] The plaintiff was entitled to RM30,235 that is, one third of the total sum of RM90,705 awarded to her.

[2] The award for general damages for pain and suffering and loss of amenities to carry interest of 6% per annum from date of service of writ until judgment and thereafter at the rate of 8% per annum until realization.

[3] The award of special damages to carry interest at 3% per annum from date of accident to date of judgment.

Cases referred to:

Ong Yoke Eng & Anor. v. Lim Ah Yew [1982] 1 MLJ 226
Brown & Anor. v. Thompson [1968] 2 All ER 708
Mallet v. McMonagle [1969] 2 All ER 178
Murtadza v. Mohd. Hassan [1980] 1 MLJ 216

For the plaintiff - Brijnandan Singh Bhar; M/s. Brijnandan Singh Bhar & Co.
For the defendant - P. R. Manecksha; M/s. V.P. Nathan & Partners

JUDGMENT

Edgar Joseph Jr J:

On the night of 5 August 1980, at about 11.45, the plaintiff, an unmarried young lady, aged 23, sustained serious personal injuries as a result of being involved in a collision with a motor-cycle while riding a pedal bicycle on her way home after work at the 747 Cafe, McAlister Road, Penang, where she was employed as a waitress.

It was common ground that the collision occurred along a straight stretch of road known as Jalan Bagan Luar, Butterworth, 20' 2" wide, reasonably well-lit and with an unhindered view for a fair distance.

There was however a sharp conflict of evidence as to how the collision occurred. On the one hand, there was the plaintiff's version, that while riding in a perfectly normal manner and keeping close to the left edge of the road she was struck from the rear by the defendant while on the other, there was the defendant's version confirmed by his police report made a few hours after the collision, that while driving at a speed between 20 - 30 miles per hour, with the lights on low beam, although visibility was poor, "all of a sudden he saw something dark in the centre of the road, applied his brakes but could not avoid colliding into it." In answer to the Court, he said that when he first saw the dark object, he was 5' - 6' from it, "was almost reaching it" and had "no time to apply his brakes."

The evidence of the Investigating Officer (PW2) when called by the plaintiff appeared to support her case because he testified that on arrival at the scene very soon after the collision he found the bicycle lying at the scene and on examining it he found that the only damage was confined to its rear mudguard and rear wheel which were bent inwards. He added that its front wheel was not damaged and that it had a red tail light apart from the reflector but, upon recall by the defence for further cross-examination after the close of its case - the application for which I granted in the exercise of my discretion (see *Ong Yoke Eng & Anor. v. Lim Ah Yew* [1982] 1 MLJ 226) in view of the discovery of fresh evidence in the shape of photographs (D6 A-D) taken by the police of the bicycle very soon after the collision - it became clear that no reliance could be placed on this aspect of his testimony. Indeed, he himself freely admitted under cross-examination "I agree in view of this photograph (referring to D6C) the evidence I gave on 27 April 1983, re: damage to bicycle, is not correct, i.e., saying no damage done to front wheel of bicycle." Not only that, the photograph D6C, suggests that the carrier, its bar and the rear mudguard were intact but the front part of the bicycle was severely damaged. In the circumstances, I am of the opinion that the defendant's version was strongly corroborated by the silent evidence of photograph, D6C, and I have no hesitation in preferring his testimony to that of the plaintiff on the issue of negligence. It follows, therefore, that I find that at the time of the collision the plaintiff was attempting to turn right thereby cutting across the defendant's right of way.

That, however, is not the end of the matter because, as Mr. Manecksha for the defendant candidly conceded, on the defendant's own evidence, he first saw "the dark object" in the centre of the road - referring no doubt to the plaintiff - when he was only 5' - 6' away from it and so could not avoid colliding into it. I might add, in passing, that the stretch of road in question being straight, fairly wide and reasonably well lit, the probabilities are that the defendant could have - had he been keeping a proper look-out - seen the plaintiff in sufficient time to avoid the collision. I might also add that, perhaps, if the defendant had been driving with his lights on high beam, he might have noticed the plaintiff sooner and thus have avoided the collision. I accordingly find that there was contributory negligence on his part.

I must now apportion liability as between the plaintiff and defendant. In doing so, bearing in mind the principles enunciated in the case of *Brown & Anor. v. Thompson* [1968] 2 All ER 708, 709, especially the principle that "when it is necessary for a Court to ascribe liability to more than one person it is well-established that regard must be had not only to the causative potency of the acts or omissions of each of the parties but to their relative blameworthiness," I must allocate the greater blame to the plaintiff. Accordingly, I find the plaintiff was two-thirds and defendant one-third to blame for the collision.

On the issue of quantum the medical evidence disclosed that the plaintiff sustained the following injuries:

1. A closed fracture of the spine with paraplegia and inability to pass water.
2. Superficial abrasions on the right eyebrow, right side of the face, right upper lip, left hand and left ankle.
3. A contusion on the left side of the parietal region of the head.

On admission to hospital, she was put on strict bedrest and given medication. She was catheterised as she was unable to pass water and, after some three weeks, she was discharged from the ward. She was then treated as an out-patient with physiotherapy to the lower limbs. She was able to walk on her own after six to seven months, by holding on to the furniture in her house.

Mr. Ong Cheng Seong, the Orthopaedic Surgeon, in his report dated 20 April 1983 a gave the following opinion and prognosis which I accept:

> The patient has sustained a most serious injury to the spine with damage to the spinal cord and its nerve roots.
>
> The function in the spinal cord and nerve roots has recovered partially. As it is now two and a half years since the injury, further improvement will be very slight if it occurs.
>
> Fortunately, she is able to walk. Her footdrop is permanent. Tendon transfer operations are not feasible as the muscles below the knee are weak. She will require bilateral calipers with toe-raising springs to enable her to walk better. Even then, she will probably require a walking stick so that she will be independent and not liable to fall.
>
> Her bladder function will also show little improvement. In addition to her present disabilities, she is also prone to recurrent urinary tract infections as a result of weak bladder tone.
>
> Her bowel function at present is poor. However, with bowel training and laxatives, a good control of bowel action is possible. She should be able to have a bowel action once in two to three days with bowel training.
>
> The patient will be able to bear children. Sexual function however has probably been detrimentally altered in the sense that libido and performance have been reduced.

Insofar as there is any conflict between the above report and Dr. Bell's evidence, I prefer the former to the latter. I have arrived at this conclusion because Dr. Bell's evidence does not contain any of the detailed information which appears in Mr. Ong's report. There is also the fact that Mr. Ong's report was based on a far more recent examination of the plaintiff than that conducted by Dr. Bell. I make these findings without meaning any disrespect to Dr. Bell who I hold in high regard.

Upon the medical evidence aforesaid, I accept the plaintiff is a semi-paraplegic as a result of which she has a serious and permanent walking disability and that there is an impairment of bladder and bowel functions. She has also suffered a partial loss of sexual desire though

she can bear children. I also accept that her matrimonial prospects are considerably diminished, though not extinguished, because she is still young and personable. In all the circumstances, I award a sum of RM60,000 for general damages, for pain and suffering and loss of amenity.

Turning to the claim for pre-trial loss of earnings, I accept that the plaintiff was in receipt of a cost of living allowance of RM35 p.m., tips of RM70 p.m. and that if not for the accident she would have been promoted to Captain with a salary of RM180 p.m. with effect from September 1980. So, her total income from October 1980, to June 1983, a period of 33 months, would have been RM9,405, and I accordingly award this sum by way of pre-trial loss of earnings. The other items of special damages were not proved sufficiently, or at all, and must therefore be disallowed.

Next, I have to consider the claim for post-trial loss of earnings. I uphold Mr. Manecksha's submission that the plaintiff, although permanently incapacitated from resuming her pre-accident occupation of waitress, is not permanently unemployable, for example, it was suggested, and I agree, that she could probably work as a cashier or a stall vendor.

I now have to decide on the appropriate multiplier and multiplicand. As regards this item of the plaintiff's claim, the case of *Mallet v. McMonagle* [1969] 2 All ER 178, 191, shows that it is seldom that sixteen years' purchase is exceeded. I propose to take a multiplier of twelve years and a multiplicand of RM200. Applying the Actuarial Tables, this would result in a sum of RM21,271.80, which I would round off at RM21,300 and which I award to the plaintiff under this head.

I do not consider that the claim for the services of a companion is sustainable. The plaintiff has been performing domestic duties after her discharge from hospital and Mr. Ong who had examined her seven days prior to the trial said that a walking stick would make her independent. I also do not consider that this part of the plaintiff's claim has been properly substantiated by medical evidence. I am afraid, therefore, that I can award nothing in respect of this part of the claim.

To sum up, I make the following awards in favour of the plaintiff:

(1)	RM 60,000	by way of General Damages for pain and suffering and loss of amenities;
(2)	RM 21,300	by way of General Damages for post-trial loss of earnings:
(3)	RM 9,405	by way of Special Damages and for pre-trial loss of earnings.
Total	RM90,705	

The above total sum of RM90,705 will, however, have to be reduced to RM30,235 in view of my finding that the plaintiff was two-thirds to blame for the collision. The award for general damages, for pain and suffering and loss of amenities will carry interest at the rate of 6% per annum from date of service of writ until judgment and thereafter at the rate of 8% per annum until realization: (see *Murtadza v. Mohd. Hassan* [1980] 1 MLJ 216) and that for special damages will carry interest at 3% per annum from date of accident to date of judgment. The defendant will also have to pay the plaintiff costs of this action.

Also found at [1984] 1 CLJ 388